EXHIBIT 2
DATE 1/22/07
HB 267

Florence-Carlton School

Proponent Written Argument HB 267

January 22, 2007

Questions Presented

I. **Under MCA §76-3-510, is the Florence-Carlton School District prohibited from requiring contractors and land developers to pay for part of the cost of capital improvements?**

II. **Under MCA §7-6-1603, can the Florence-Carlton School District impose an "impact fee" against contractors and land developers building within the school district to help pay for expansion to the school required because of the new growth in the district?**

III. **Should School Districts be allowed to have "impact fees"?**

Discussion

Background and Legislative History

Impact fees became statutorily authorized in 2005 with the enactment of Montana Code Ann. § 7-6-1603. Impact fees are a one time fee imposed on new development for the purpose of constructing new growth related infrastructure. They cannot be used to fund the operations of facilities or for the improvement of existing public facilities. Rather, they are specifically to be used for growth and development needs of public infrastructure that is required to keep up with increased growth in municipal areas. Under this statute cities and counties are given the right to charge these fees to builders and developers when they begin new development that directly impacts public infrastructure.

Several cities were imposing impact fees prior to the passage of this statute under their independent local governing authority. For example, Bozeman and Missoula have been imposing impact fees based on a 1990 Supreme Court decision that recognized the power of local governments to impose such a fee.

Needless to say, this has been a source of significant contention between land developers and local governments for some time. City and local government representatives pushing for the passage of the legislation favored impact fees as a revenue source for needed growth related infrastructure demands. Many believe that the cost-causers should be the cost-payers, and that general property taxes should not be the sole source of paying for the needed infrastructure. Mont. Sen. Local Govt. Comm., Hearing on SB 185 and 158, 59th Leg., Sess. 3-4 (Jan. 25, 2005).

Rather than opposing impact fees outright, representatives of the building and construction industries also proposed a version of the impact fee legislation, Senate Bill 158, for the Montana Legislature to consider. The versions were similar in many ways, but had some distinct differences. Despite the differences, both sides agreed that a statute authorizing the fees was necessary to appropriately empower local governments to impose the fees, and to provide uniformity and consensus through the counties and cities

with which developers and contractors could rely upon. With both sides in agreement that the impact fee legislation was needed, the difficulty began in coming to a compromise on how the statute should be drafted and the ultimate scope of the impact fees.

When the Senate Local Government Committee heard testimony on the two forms of the legislation, there was discussion of what types of infrastructure needs would be appropriately funded by impact fees. Several community representatives wanted impact fees for parks, recreation, and open space. The land developers felt that these, and other items such as public libraries, were outside the public necessities that they should be required to fund. Curt Chishom, of the Montana Building Industry Association, felt impact fees should only be necessary for five areas: public water, public sewer, transportation facilities, emergency services, and storm water. *Id at 9.* Others expressed desires that fees not be used for state and federal road construction for fear of jurisdiction complications, and because developers were already under state obligation to complete and pay for traffic studies and pay for needed road improvements or development. Opposition against using fees to pay for development of city parks was expressed because it would result in a double tax. Land developers were already required under subdivision regulations to set aside land for parks, and now they would be responsible to pay for their development also. There was no discussion from either side regarding the appropriateness of using impact fees for educational purposes. Mr. Kakuk, an attorney for the building industry, called these fees an "exaction." For these exactions to be legal they need to meet three tests:

(1) Substantive Due Process Test – the local government must have the authority to impose an impact fee. The statute would clearly grant that authority. (Although impact fees were upheld by the Montana Supreme Court previously because deemed appropriate under municipalities self governing power, Bozeman City Attorney, Tim Cooper, cautioned reliance upon this case law. He expressed relief that this authority would become statutory). *Id. at 13.*

(2) Equal Protection Test – the fee must be applied to all development equally.

(3) The Impact Fees Cannot be a "Takings" done without just compensation – this requires:

   (a) Nexus – there must be a rational connection between the desired action and the impact fee.
   (b) Proportionality – must only be used for the new infrastructure development that is affected by the new building development. Impact fees cannot be used for existing problems or maintenance. There was a great deal of discussion on the need for both a nexus between the fee and the infrastructure needs and the proportionality of how the amount of the fee would be determined.

The Senate Local Government Committee noted that there were more similarities than differences between the two proposals, and encouraged them to meet together and come to a compromise and present a mutually supported proposal to the House Local

Government Committee. This they did, and the presented an uncontested proposal to the House on March 10, 2005. At this hearing again the scope of impact fees was discussed. It was expressed that this was a topic of contention between the opposing factions but that they had reached a compromise. It was proposed that impact fees be only imposed for construction of public infrastructure facilities. The definition of these facilities included five explicit areas:

(1) public water
(2) public sewer
(3) public storm drainage
(4) public transportation facilities
(5) emergency fire, police, and medical rescue facilities.

However, impact fees could also be used for public infrastructure beyond these five areas if supported by two-thirds vote of the City Council or local government, or by a unanimous vote for counties. This added provision demonstrates an option, deliberately left available, for impact fees to be imposed for areas beyond the five explicitly stated. These other areas of use were to be left up to the individual local governments and counties to decide. This additional provision, presented to the House Committee and ultimately placed in the statutory language, closes the door for any arguments supporting strict adherence to imposing impact fees for only a select few public facilities. **The scope of the impact fees was deliberately left open and up to the determination of the individual local governments. There is strong argument that expansion of public schools is a valid reason for the imposition of impact fees, and currently many states that allow impact fees use them for public school development.**

It appears the Legislature adopted the proposal that was presented to the House almost verbatim. In the definition section of Part 16, MCA 7-6-1601, the statue defines "public facilities" as:

(a) a water supply production, treatment, storage, or distribution facility;
(b) a wastewater collection, treatment, or disposal facility;
(c) a transportation facility, including roads, streets, bridges, rights-of-way, traffic signals, and landscaping;
(d) a storm water collection, retention, detention, treatment, or disposal facility or a flood control facility;
(e) a police, emergency medical rescue, or fire protection facility; and
(f) ***other facilities*** for which documentation is prepared as provided in 7-6-1602 that have been approved as part of an impact fee ordinance or resolution by:
    (i) a two-thirds majority of the governing body of an incorporated city, town, or consolidated local government; or
    (ii) a unanimous vote of the board of county commissioners of a county government. Mont. Code Ann. § 7-6-1601 (2005), Emphasis added.

From the text of the statute, and from the legislative history, it is clear that the Legislature foresaw the time when local governments would seek to use impact fees for uses beyond the five that are clearly enumerated. The statute provides the avenue and procedure for authorizing these other areas.

IV. While school impact fees are currently used in other states, no local governments in Montana have tried to impose them under authority MCA 7-6-1603.

A review of the use of impact fee usage in other states shows that this is not a novel application of the fee. Several other states have successfully used this type of legislation to impose impact fees for public education facilities. *See Wellington River Hollow, LLC v. King County*, 54 P.3d 213 (Div.1, 2002) – impact fees used to fund classroom improvements throughout school district was proper under the County plan that collected the fees to ensure adequate facilities for growth attributable to new development. *See also Coalition for Affordable Housing v. City of Los Angeles Bd. of Educ.*, 2003 WL 21500687 (Cal. App. 2d Dist. 2003) school impact fee plan was approved as in line with the governing enabling statute. The use of impact fees to fund educational facilities expansion required from new development is a case of first impression in Montana.

School impact fee lawsuits from other states challenge local ordinances as a violation of other controlling law, both statutory and jurisprudential. Depending on the way the enabling legislation is drafted and how the impact fee is applied, several courts have held them to be just an unauthorized tax or literally a governmental taking. After a review of some of the relevant federal case law, the Montana enabling statute appears to be carefully drafted, and comports with the jurisprudential requirements of nexus and proportionality and are therefore lawful excises rather than taxes or takings.

Also, several states have held school impact fees invalid because they were explicitly preempted by the state statutory scheme for public education financing. In 1996 Nevada case school impact fees were imposed by a local ordinance which levied in-lieu fees or land dedications on development to finance school site acquisitions. *Douglas County Contractors Ass'n v. Douglas County*, 929 P.2d 253 (1996). The program applied to individual dwellings, and was lawful only if the impact fee statute authorized the type of capital improvements for which the fees were being imposed. The Court then analyzed its statutory impact fee language and legislative history. The Court concluded that the capital improvements listed in the state impact fee legislation were exclusive – listing drainage, sewer, storm water, or water projects – and concluded that the absence of school site acquisition from the list shows an intent to prohibit school impact fees.

This case is distinguishable from the situation facing Florence-Carlton. Both states have specific impact fee legislation, but whereas Nevada's contains an express list of proper capital improvements that could be interpreted as exhaustive, the **Montana statute clearly includes a provision for other improvements that can be authorized by a two-thirds vote of the City Council local governments having the authority or authorize capital improvements beyond the specifically enumerated areas in the statute.**

The validity of county-wide school impact fees was also presented to the Supreme Court of Colorado in *Board of County Com'rs of Douglas County, Colo. V. Bainbridge, Inc.*, 929 P.2d 691 (1996), as modified on denial of reh'g, (Jan. 13, 1997). Here two counties contended that they had the authority to impose school impact fees at the time a

had never before entirely preempted the arena of school finance from impact fee use, the counties were not authorized to impose the school impact fees in question because the state legislature had already statutorily fixed the time and amount of school exaction fees as part of the subdivision approval process. The counties did not have the power to override the legislature's choice of collecting school impact fees.

This case is distinguishable from Florence-Carlton's situation in that Florence-Carlton would be acting not under mere county authority to impose the school fees, but rather under express statutory authority. However, this case is similar because the Colorado land use statute specifically addressed and provided for school excises. Montana has a similar land use statute, MCA 76-3-510, which addresses the imposition of excises on subdivision development. It expressly prohibits them for educational purposes. This language expresses a clear legislative development. Any arguments in favor of imposing school impact fees in Montana must therefore coordinate the two apparently conflicting statutes.

There is a genuine issue that has been raised in opposition to Florence-Carlton's use of impact fees that such educational use of impact fees directly conflicts with another Montana statute, MCA 76-3-510, which imposed fees and regulations on subdivision development. This statute, enacted in 1995, specifically states that no subdivision fees will be imposed for educational needs. Montana Code Ann. § 76-3-510 (2005).

Because the statutory language under MCA 7-6-1603 allows for local governments to approve capital improvements beyond the enumerated list, the central issue in Florence-Carlton's case become whether MCA 76-3-510 prohibits the use of impact fees for school expansion.

IV. Was MCA 7-6-1603 meant to repeal the portion of MCA 76-3-510 that prohibits the use of subdivision excises for educational purposes?

Neither the text of MCA 7-6-1603 nor a review of the legislative history of the statute's enactment reveal any reference to MCA 76-3-510's prohibition of subdivision fees for educational purposes. There were no school officials attending the legislative hearings which put forth this question, and the appropriateness of imposing school impact fees under the new legislation was never raised. The only parties represented at the bargaining table were various members of local and city governments, such as city planners, mayors, and county attorneys, and members from the land development and construction industries. No questions, concerns, or arguments were proffered regarding using the fees to fund educational needs. One might conclude that this was because it was generally accepted that school fees could be one of the other types of capital improvements that would be permissible if supported by the individual local governing bodies.

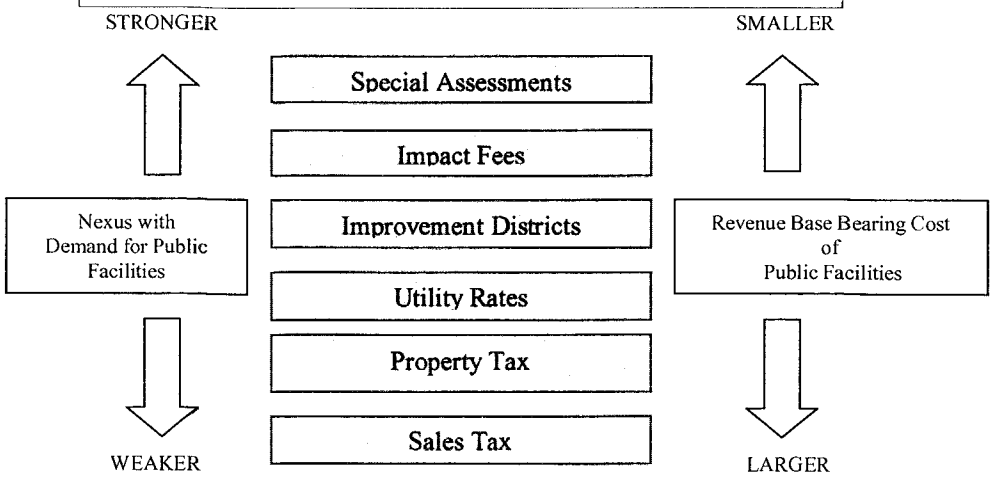
When interpreting statutory language, courts generally impose the rule of interpretation that the more specific language of a statute will take precedent over more general language. Here, MCA § 76-3-510 specifically precludes educational fees for subdivision development which MCA § 7-6-1603 is more general and may include educational districts. Further, courts favor an interpretation that gives meaning to the

statute in question and validity to other statutes that have the potential of being in conflict with a given statute. This rule of construction is true in interpreting contract language as well. If possible, terms of a contract are to be interpreted in a way that gives meaning and validity to other provisions in the contract. Here it is possible to interpret the new 2005 impact fee statute in a way that gives validity to the 1995 subdivision statute. Absent any evidence that the Legislature meant for the new law to repeal the school impact fee portion of the existing law, there is a possibility that the Courts will favor an interpretation that excludes impact fees for educational purposes.

Why School Impact Fees

Infrastructure funding alternatives force decision-makers to wrestle with a dynamic tension between two competing desires. As shown on the left side of Figure 2, various funding options have a strong-to-weak connection between the source of funds and the demand for public facilities. It is unfortunate that the funding options with the closest nexus to the demand for public facilities also have the smallest revenue base to bear the cost of the public facilities (see the right side of the diagram below). For example, only new housing units generate school impact fees. In contrast, on-going revenues like property taxes are paid by existing development, plus new development that is added each year. Therefore, the property tax base continues to increase over time, but the increase in new housing units is relatively constant from year to year.

Figure 2 - Infrastructure Funding Alternatives



Source: Paul Tischler, Dwayne Guthrie and Nadejda Mishkovsky. 1999. Introduction to Infrastructure Financing. IQ Service Report, Vol. 31, No. 3. Washington, DC: International City/County Management Association.

By approving impact fees, elected officials are making a policy decision to change the funding sources for public schools. Implementing school impact fees decreases reliance on broad-based revenues, like property taxes, by adding a new revenue source that has a stronger nexus between new development and the demand for public facilities. As a dedicated revenue source, impact fees could provide significant funding for growth-related school capacity in the Florence Carlton School District.

Conclusion

The 2005 legislation authorizing governments to impose impact fees on new development to fund the public infrastructure costs directly needed because of the new development does not prohibit the use of school impact fees. However, if the impact fees are going to be used for school purposes, the local government officials would have to approve it by a two-thirds vote, or if imposed on a county level, a unanimous vote of the county commissioners.

This being said, a different problem arises in that Montana has current local subdivision regulations in place that prohibit the imposition of fees required of subdivision developers for educational purposes. Since there is a lack of any factual or circumstantial evidence suggesting that MCA 7-6-1603 was intended to repeal this portion of the subdivision statutes, it is certainly likely that a court could interpret the new impact fee statute not to include fees use for educational purposes.

There are strong policy arguments supporting the imposition of school impact fees on local developers of residential housing units. However, courts are often reluctant to entertain these arguments when there is statutory language to the contrary because of the general notion that public policy decisions of this sort are best left to the legislative process. Florence-Carlton would have to rely heavily upon these policy arguments because there is a lack of Montana case law in this area. A strong policy argument could be presented that if a new development creates the need for school expansion, there is a closer nexus when fees are imposed upon those creating the need than when the fees are distributed through general property taxes.

The bottom line is should tax payers who have supported the school for many years now be burdened with higher taxes. Should those senior citizens in our community who have actively lead our youth sports leagues, boy scouts, girl scouts and may more activities have their fixed incomes attacked because of new growth and development. As people move into their golden years on fixed income they desire to know that big builders will not come in and create the type of growth that will negatively impact their quality of life.

It is conclusive that new growth has impact on the infrastructure of our communities. We know that schools are at the center of our communities and that with growth in the number of new homes come the growth of new children to schools. The time has come for all parties to identify a comprehensive and equitable tax system for capital improvements. At the state level we must recognize the benefits to the entire community of having good schools and adequate school facilities. It is time to make school impact fees a part of the tax bill for constructing new schools. Property tax increases should not shoulder the entire burden.